

Koh Tiong Hock v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05-1
OF 2002

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TENGKU BAHARUDIN SHAH, WAN ADNAN MUHAMAD AND
SULONG MATJERAIE JJCA
7 JULY 2010

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Criminal Procedure — Dangerous drugs — Trafficking — Appeal against conviction and sentence under s 39B of the Dangerous Drugs Act 1952 ('DDA') — Whether statement under s 37A of the DDA voluntarily made — Whether manner of concealment of drugs on body proved mens rea possession — Whether contention that direct evidence required to prove knowledge good law — Whether drugs 'in transit' — Whether fact drugs not intended for distribution within Malaysia relevant — Whether gravamen of charge act of transporting for purpose of distribution or act of distribution itself

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The appellant appealed to the Court of Appeal against his conviction and sentence in the Penang High Court for drug trafficking under s 39B of the Dangerous Drugs Act 1952 ('DDA'). The facts showed he was waiting to exit at the departure gate of the Bayan Lepas International Airport in Penang to board a flight to Singapore when he was arrested by police and taken to the airport's police station where a body search revealed eight transparent plastic packets containing tablets taped to his abdomen — three each at the front and back and one on either side — with three body braces strapped over them wrapping them around his body. Over this he had worn a T-shirt and a jacket. The plastic packets contained 7,468 tablets totaling 801.7g of methylene dioxymethamphetamine, a dangerous drug under the DDA. In his cautioned statement under s 37A of the DDA ('P35') the appellant admitted he came to Penang the day before his arrest to 'collect something' to be taken to Singapore and New Zealand. He said the plastic packets were strapped onto him by two men at a hotel who told him what to do and gave him a plane ticket and some cash. He also admitted having previously carried drugs from Bangkok to Taiwan and from Amsterdam to Bangkok for money. In calling for the defence the trial judge found the appellant had custody, control and knowledge of the drugs and that a prima facie case of trafficking had been established. The judge rejected the appellant's defence holding no reasonable doubt over the prosecution's case had been cast. In the instant appeal the appellant said the trial court was wrong, inter alia, to have (i) admitted P35 since it was not voluntarily given; (ii) found that he had mens rea possession of the drugs; and (iii) found a case of trafficking instead of the drugs being 'in transit' as the

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A appellant was on transit to Singapore and the drugs were intended to be taken to New Zealand and were not for distribution in Malaysia.

Held, dismissing the appeal and affirming the conviction and sentence:

- B (1) The appellant chose not to testify at the trial-within-a-trial to rebut prosecution's evidence that he voluntarily gave the statement (P35). He did not cross-examine any prosecution witness on the allegation he gave the statement out of fear of being beaten or that the police had asked him to admit the drugs belonged to him in return for a reduction of the charge against him. As to the caution under the DDA, the appellant's counsel
- C conceded the caution was duly administered before P35 was taken (see paras 8 & 10).
- D (2) Even when he made his defence the appellant did not at any time aver that he gave P35 because of any inducement, promise or threat. On the contrary, he said he co-operated with police in giving P35 in the hope of getting a lesser charge, impliedly admitting that P35 was voluntarily given (see para 10).
- E (3) The manner in which the plastic packets were taped to the appellant's body, covered with braces and concealed under his T-shirt and jacket to avoid detection supported an inescapable inference that he must have known they contained dangerous drugs. The appellant himself admitted in P35 that he was paid to transport the drugs out of the country. The tablets within the transparent plastic packets could be seen with the
- F naked eye. It was therefore most unlikely for the appellant not to have seen them when the packets were taped to the front and sides of his abdomen (see para 14).
- G (4) The law is clear and well settled that knowledge or intention as the mental element of an offence could only be proved by inference from the surrounding circumstances. The decision in *Toh Su Kuan v Public Prosecutor* [2005] 3 CLJ 740 that knowledge could only be proved by direct evidence and not by way of inference from proved facts is clearly to the contrary. Subsequent decisions of the Court of Appeal have disregarded, not followed or ignored that case. Though not over ruled, the case has been rejected by the Federal Court for being erroneous and inconsistent with settled legal principles — see *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19 which held that Toh Su Kuan should be over ruled for being erroneous and per incuriam (see para 12).
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- I (5) The drugs were not 'in transit' as they came from within the country. Nor was the appellant on transit as he transported the drugs from a hotel in Penang to the airport (see para 18).
- (6) Whether the drugs were intended for distribution outside the country was irrelevant to the offence of trafficking under the DDA. The word

‘exporting’ as an act of trafficking defined under s 2 of the DDA puts distribution abroad within the contemplation of the law. The gravamen of the charge was not the act of distributing the drugs but the act of transporting the drugs for the purpose of distribution irrespective of whether the purpose was achieved or whether the intended distribution was within the country or abroad (see para 19).

[Bahasa Malaysia summary]

Perayu merayu ke Mahkamah Rayuan terhadap sabitan dan hukumannya di Mahkamah Tinggi Pulau Pinang bagi pengedaran dadah di bawah s 39B Akta Dadah Berbahaya 1952 (‘ADB’). Fakta menunjukkan bahawa dia sedang menunggu untuk keluar di pintu pelepasan Lapangan Terbang Antarabangsa Bayan Lepas di Pulau Pinang untuk menaiki kapal terbang ke Singapura apabila dia ditangkap oleh polis dan dibawa ke balai polis lapangan terbang di mana suatu pemeriksaan badan mendedahkan lapan bungkusan plastik lutsinar mengandungi pil-pil yang dilekat ke badannya — tiga setiap satu di hadapan dan di belakang dan satu di setiap tepi — dengan tiga pendakap badan yang diikat di atasnya membalut pil-pil tersebut di sekeliling badannya. Di atasnya dia memakai sehelai baju T dan jaket. Bungkusan plastik tersebut mengandungi 7,468 pil-pil yang terjumlah kepada 801.7g methylene dioxymethamphetamine, dadah berbahaya di bawah ADB. Di dalam kenyataan beramarannya di bawah s 37A ADB (‘P35’) perayu mengaku bahawa dia datang ke Pulau Pinang sehari sebelum penangkapannya untuk ‘collect something’ untuk di bawa ke Singapura dan New Zealand. Dia berkata bahawa bungkusan-bungkusan plastik diikat padanya oleh dua lelaki di sebuah hotel yang menyatakan kepadanya apa yang perlu dibuat dan memberikan kepadanya suatu tiket penerbangan dan sedikit wang tunai. Dia juga mengaku telah, sebelum ini, membawa dadah dari Bangkok ke Taiwan dan dari Amsterdam ke Bangkok untuk wang. Semasa menyuruh membela diri hakim perbicaraan mendapati bahawa perayu mempunyai kawalan, milikan dan pengetahuan tentang dadah tersebut dan bahawa kes prima facie pengedaran telah dibuktikan. Hakim menolak pembelaan perayu menyatakan bahawa tidak ada keraguan munasabah ditunjukkan terhadap kes pihak pendakwa. Di dalam rayuan ini, perayu menyatakan bahawa mahkamah perbicaraan telah terkhilaf, antara lain, kerana (i) menerima P35 kerana ia tidak diberikan secara sukarela; (ii) mendapati bahawa dia mempunyai mens rea milikan dadah; dan (iii) mendapati kes pengedaran dan bukan kes berada dalam ‘in transit’ kerana perayu sedang dalam persinggahan ke Singapura dan dadah tersebut diniatkan untuk dibawa ke New Zealand dan bukan untuk diedarkan di Malaysia.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

- (1) Perayu memilih untuk tidak memberi keterangan di dalam perbicaraan di dalam perbicaraan untuk mematahkan keterangan pihak pendakwaan bahawa dia memberikan kenyataan (P35) secara sukarela. Dia tidak

- A memeriksa balas mana-mana saksi pihak pendakwaan atas dakwaan bahawa dia memberikan kenyataan tersebut kerana takut dipukul atau bahawa pihak polis telah menyuruhnya mengaku bahawa dadah tersebut miliknya sebagai balasan untuk pertuduhan yang lebih ringan terhadapnya. Berkaitan dengan amaran di bawah ADB, peguam perayu
- B mengaku bahawa amaran tersebut diberikan sebelum P35 diambil (lihat perenggan 8 & 10).
- (2) Walaupun apabila dia membela diri, perayu tidak, pada bila-bila masa menyatakan bahawa dia memberikan P35 disebabkan oleh dorongan, janji atau ugutan. Sebaliknya, dia menyatakan dia bekerjasama dengan
- C pihak polis dalam memberikan P35 dengan harapan mendapat pertuduhan yang ringan, secara tidak langsung mengakui bahawa P35 diberikan secara sukarela (lihat perenggan 10).
- (3) Cara bagaimana bungkusan plastik tersebut dilekatkan pada tubuh
- D perayu, ditutup dengan pendakap dan disembunyikan di bawah baju T dan jaketnya untuk mengelakkannya daripada dikesan menyokong inferens yang tidak boleh disangkal bahawa dia sememangnya mengetahui bahawa ia mengandungi dadah. Perayu sendiri mengaku dalam P35 bahawa dia dibayar untuk membawa dadah-dadah tersebut
- E keluar dari negara ini. Pil-pil di dalam bungkusan lutsinar boleh dilihat dengan mata kasar. Oleh itu tidak mungkin perayu tidak melihatnya apabila bungkusan-bungkusan tersebut dilekat ke bahagian hadapan dan tepi badannya (lihat perenggan 14).
- (4) Undang-undang adalah jelas dan matan bahawa pengetahuan atau niat sebagai unsur mental sesuatu kesalahan hanya boleh dibuktikan oleh inferens daripada hal keadaan sekeliling. Keputusan di dalam kes *Toh Su Kuan v Public Prosecutor* [2005] 3 CLJ 740 bahawa pengetahuan hanya boleh dibuktikan oleh keterangan langsung dan bukan melalui inferens
- G daripada fakta yang dibuktikan adalah jelas sebaliknya. Keputusan yang kemudian oleh Mahkamah Rayuan telah tidak mengendahkan, tidak mengikut atau tidak menghiraukan kes itu. Walaupun tidak ditolak, kes tersebut telah ditolak oleh Mahkamah Persekutuan kerana silap dan tidak konsisten dengan prinsip undang-undang yang matan – lihat
- H *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19 yang memutuskan bahawa *Toh Su Kuan* sepatutnya ditolak kerana silap dan per incuriam (lihat perenggan 12).
- (5) Dadah-dadah tersebut bukan ‘in transit’ kerana ia datang dari dalam negara. Perayu juga bukan dalam persinggahan kerana dia membawa dadah tersebut dari sebuah hotel di Pulau Pinang ke lapangan terbang
- I (lihat perenggan 18).
- (6) Sama ada dadah tersebut diniatkan untuk pengedaran di luar negara adalah tidak relevan kepada kesalahan pengedaran di bawah ADB.

Perkataan 'exporting' sebagai tindakan mengedar seperti yang didefinisikan di bawah s 2 ADB meletakkan pengedaran di luar negara dalam rangkuman undang-undang. Keseriusan pertuduhan tersebut bukan tindakan mengedarkan dadah tersebut tetapi tindakan membawa dadah untuk tujuan pengedaran tanpa mengira sama ada tujuan tersebut dicapai atau sama ada pengedaran yang diniatkan adalah dalam negara atau luar negara (lihat perenggan 19).]

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Notes

For a case on trafficking, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 1767.

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Cases referred to

Chan Ming Cheng v PP [2002] 3 MLJ 733, CA (refd)

Cheong Su Leong v PP [1948] MLJ Supp 56 (refd)

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Emmanuel Yaw Teiku v PP [2006] 5 MLJ 509, FC (refd)

Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489; [2004] 4 CLJ 551, CA (refd)

Lau Chi Sing v PP [1989] 1 MLJ 5, CCA (refd)

Mimanga Lesaly v PP [2005] 4 MLJ 314, CA (refd)

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Ong Ah Chuan v PP [1981] 1 MLJ 64, PC (refd)

PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)

PP v Chan Pan Leon [1956] 1 MLJ 237 (refd)

PP v Law Say Seck & Ors [1971] 1 MLJ 199 (refd)

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PP v Lim Ah Hai [1992] 3 CLJ 1733, HC (refd)

PP v Mohd Fuzi b Wan Teh [1989] 2 CLJ 652

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (folld)

PP v Jorge Enrique Pellon Tellon [1998] 4 MLJ 183, CA (refd)

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Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (refd)

Teh Hock Leong v PP [2010] 1 MLJ 741, FC (refd)

Toh Su Kuan v PP [2005] 3 CLJ 740, CA (refd)

Tunde Apatira & Ors v PP [2001] 1 MLJ 259, FC (refd)

Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)

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Wjchai Ompron v PP [2006] 5 MLJ 415, CA (refd)

Wong Nam Loi v PP [1997] 3 MLJ 795, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 21(6), 37A, 39B

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Gurbachan Singh (Bachan & Kartar) for the appellant.

Wong Chiang Kiat (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

A **Tengku Baharudin Shah JCA:**

B [1] The appellant was tried and convicted by the Penang High Court for an offence of trafficking in dangerous drug committed on 21 July 2000 at about 4pm at the departure gate of the Bayan Lepas International Airport in Penang. He was duly sentenced as mandated under s 39B of the Dangerous Drugs Act 1952 ('DDA'). We heard his appeal and dismissed it, we affirmed the conviction and sentence.

C [2] The facts of the case are basically undisputed. On the date and at the time as stated in the charge the appellant was waiting to exit at the departure gate No 6 when he was arrested by SP4 and SP5 and taken to the airport police station where a body search was carried out on him. Eight transparent plastic packets ('P12A-H') containing tablets were found taped to his abdomen, three each in the front and back and one on each side with three body braces strapped over them wrapping them around his body. He wore his T-shirt over them and also a blue jacket outside. He also had a trolley bag and a sling bag with him. From the sling bag were recovered two plane tickets for the journey from Penang to Singapore dated 21 July 2000 and from Singapore to Penang dated 20 July 2000, a boarding pass dated 21 July 2000 a Singapore identity card and a Singapore passport all bearing his name.

F [3] P12A-H contained a total of 7468 tablets which were subsequently analysed by the government chemist SP3 and found to contain 801.7g of three, four *methylene dioxymethamphetamine* or MDMA (the proscribed drug) a dangerous drug defined under the DDA.

G [4] A statement under s 37A of the DDA was recorded by SP7 around midday on the day after the appellant's arrest. It was admitted as evidence after a trial within a trial and marked as exh P35. Therein the appellant admitted that he came to Penang on 20 January 2000 at a friend's request by telephone to collect something from there to be taken to Singapore and New Zealand.

H Two male Chinese strapped P12A-H around his body at a hotel and he was told what to do and given a plane ticket. He also admitted having previously carried drugs from Bangkok to Taiwan and from Amsterdam to Bangkok for which he was paid SD7,000 for each trip. From this third trip he was to be paid 80 cents per tablet.

I [5] In calling for the appellant's defence the learned trial judge found the appellant had custody and control as well as knowledge of the proscribed drug in the packets strapped around his body. The manner in which they were concealed irresistibly inferred that he had the prerequisite knowledge. Besides

that the appellant also admitted in P35 that he was paid to transport P14A–H out of Penang. There was thus a prima facie case of trafficking.

[6] In his defence the appellant said that he was forced by two male Chinese he met in Penang to carry and deliver to someone in New Zealand the packets P14A–H which were strapped around his body and that he had no knowledge and was not informed of their contents. He was given the plane ticket, NZD1,000 in cash and some Malaysian and Singapore currencies. On P35, the appellant contended that he gave the statement for fear of being beaten up and that what he related therein about the telephone call in Singapore and the offer to fetch and carry something to New Zealand was untrue. He said he gave the statement in the hope of a lesser charge being proffered against him. The learned trial judge after having duly considered the appellant's defence rejected the same. He found no reasonable doubt raised on the case against the appellant and convicted him.

[7] Before us, learned counsel for the appellant again challenged the admissibility of P35 and the court's reliance on it. He contended that the learned trial judge was wrong to admit P35 because the recording officer also acted as interpreter and he was an interested person. Reliance was placed on *Cheong Su Leong v Public Prosecutor* [1948] MLJ Supp 56 and *Chan Ming Cheng v Public Prosecutor* [2002] 3 MLJ 733. He also submitted that the caution was not sufficiently explained to the appellant and there was no evidence of the exact words used in cautioning him. Counsel cited cases of *Public Prosecutor v Mohd Fuzi b Wan Teh* [1989] 2 CLJ 652, *Public Prosecutor v Lim Ah Hai* [1992] 3 CLJ 1733 and *Public Prosecutor v Law Say Seck & Ors* [1971] 1 MLJ 199. It was also submitted that for capital punishment cases the caution should reflect the consequence of a death sentence arising from the statement. Then counsel conceded that the caution under the DDA was duly complied with and that the appellant did not testify in the trial within a trial but it was submitted that the appellant in this defence did say that the police asked him to admit the drug belonged to him and that if he did the charge against him would be reduced.

[8] It is significant that SP7 spoke to the appellant in the Hokkien dialect, that being the language of the latter's choice as reflected in the first part of P35. Though P35 was recorded in Bahasa Malaysia the objection to its admissibility was not for any inaccuracy of its contents or translation but rather for not being voluntarily given. Despite so objecting the appellant chose not to take the stand in the trial within a trial to rebut the prosecution evidence that he voluntarily gave the statement and that he was made aware and knew that he was not obliged to give a statement and yet chose to give one on his own free will. Indeed learned counsel conceded that the caution was duly administered. In fact the appellant in his own defence did not, after the

- A contents of P35 was translated to him by the court's Chinese interpreter, deny that the statement was his or that it was not what he said, nor that it was not voluntarily given. On the contrary, he only alleged for the first time, that he gave the statement out of fear of being beaten up. Even then he did not say what caused him to harbour such fear nor whether anyone had used any force or
- B threat against him to give rise to such fear. The appellant's own words on the matter removed any doubt that he volunteered the information given to SP7 in P35. This is what he said:

- C Saya bekerjasama dengan Insp Chang (SP7) untuk memberi kenyataan. Tujuan saya bekerjasama ialah supaya dapat ringankan tuduhan (see p 133 AR).

That tantamounts to an admission that he willingly gave the statement to SP7 whatever his intention. He in fact denied that SP7 promised him a lesser charge and if anyone else did the appellant would have so stated.

- D [9] The circumstances leading to the recording of P35 and the reaffirmation of its contents by the appellant by signing on its every page and the appellant's testimony in defence did not permit reliance on the authorities cited by learned counsel which are totally distinguishable and irrelevant. We found no cause to
- E disturb the findings of the learned trial judge at the end of the trial within the trial. He had duly evaluated the evidence and all the allegations raised before arriving at the correct conclusion that P35 was voluntarily given by the appellant and thereby allowing its admission as evidence.

- F [10] As for counsel's submission that the trial judge should have reconsidered his decision to admit P35 in view of the appellant's allegation in his defence that he gave the statement in fear of being beaten and that the police had asked him to admit that the drug belonged to him in return for the reduction of the charge against him, we have no doubt that the learned judge was right in
- G finding such assertion to be mere after thought. Were the allegation true the appellant would have raised them in the course of the trial within the trial. He did not testify nor cross-examine any prosecution witness on point. SP4 was not challenged when he said the caution under s 37A of the DDA was read to the appellant as early as the time of his arrest. It is also not denied that SP7 again
- H explained to him the caution before recording P35 less than 24 hours later. Even in his defence the appellant did not at anytime aver that he gave the statement because of any inducement, threat or promise. On the contrary, he proffered that he cooperated with the police (by giving the statement) in the hope of getting a lesser charge, impliedly admitting that P35 was voluntarily
- I given.

[11] Learned counsel then disputed the learned trial judge's finding of knowledge. He contended that the judge was wrong in finding that the

appellant knew about the proscribed drug merely on the ground that P14A–H which contained the said drug were tied around his body. He urged us to follow the decision of this court in *Toh Su Kuan v Public Prosecutor* [2005] 3 CLJ 740 which held that the manner in which the packets were fastened to the appellant's person (strapped to his legs, tied to his waist and concealed in his shoes) only show at the highest that he had knowledge the packets contained some prohibited substance which was unlawful to have in one's possession, but not prove that the appellant knew the packets contained heroin the drug which formed the subject matter of the charge. In other words mens rea possession had not been established. That decision was said to be still good law as it had not been overruled by the Federal Court.

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[12] With respect, the law is clear and well settled in that knowledge or intention as the mental element of an offence can only be proved by inference from the surrounding circumstances. See *Public Prosecutor v Chan Pan Leon* [1956] 1 MLJ 237, *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356 (HL); *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64 (PC); *Wong Nam Loi v Public Prosecutor* [1997] 3 MLJ 795 (CA) and *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337 (FC) and *Emmanuel Yaw Teiku v Public Prosecutor* [2006] 5 MLJ 509 (FC). The effect of the decision *Toh Su Kuan* is clearly to the contrary in holding that knowledge can be proved only by direct evidence and not by way of drawing an inference from proved facts. We note that *Toh Su Kuan* has been disregarded, not followed or practically ignored by subsequent decisions of this court. See *Gunalan all Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 4 CLJ 551, *Mimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314 and *Wjchai Ompron v Public Prosecutor* [2006] 5 MLJ 415. It may not have been specifically overruled but the Federal Court had struck its death knell when it was rejected for being erroneous and inconsistent with settled legal principles. See *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19 which held that *Toh Su Kuan* should be overruled and not followed for being erroneous and per incuriam.

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[13] In *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259 where packets of drug were swallowed by the appellants and found in their stomachs when arrested, the Federal Court affirmed their convictions for trafficking holding that the totality of the evidence reasonably supports that the appellants were in actual possession of the proscribed drug at the time of their initial detention. In *Teh Hock Leong v Public Prosecutor (Criminal Appeal No 05–84 of 2003 since reported in* [2010] 1 MLJ 741) the proscribed drug in the form of

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A solution was soaked in towel and under clothes and transported in a back pack with clear object to avoid detection. This court held that the evidence of knowledge can be inferred as follows:

B The method employed to convey or transport a drug may sometimes furnish evidence of knowledge. For example, an attempt to carefully conceal a drug may indicate an intention to avoid detection and thereby put to knowledge. Of course it all depends on the fact of each case.

C [14] In our case the manner the packets P14A–H containing the proscribed drug were taped to the appellant's body, covered with braces and concealed under his T-shirt and jacket to avoid detection supports an inescapable inference that he must have known that they contained dangerous drug. Such inference is further fortified by the appellant's own admission in P35 that he was paid to transport the said drug out of the country. On top of that you need only look at any of the eight transparent plastic packets P14A–H to see the drug tablets contained therein. Photographs P7A and B show how visible they were to the naked eye, it was most unlikely for the appellant not to have seen them when the packets were taped to the front and sides of his abdomen.

E [15] On established facts, there is clearly overwhelming evidence for the learned judge to find not only knowledge and possession but also trafficking as defined under s 2 of the DDA of the proscribed drug by the appellant to require his explanation and to reject what was proffered in defence.

F [16] In *Wjchai Onprom v Public Prosecutor* [2006] 5 MLJ 415 the facts are similar to the present case but minus the caution statement. The appellant therein was entering the country from Thailand, instead of leaving as in this case, when he was arrested. Packets of drug were found taped under his T-shirt and in his jacket pocket. Adopting the test of mens rea possession applied in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 this court held that as the appellant was caught carrying a very large amount of drug from Thailand to Malaysia it was safe to infer that the drug was intended for trafficking and that it was not a case of mere passive possession but an overt act of concealing the drug on his person which reasonably supported the existence of criminal purpose proscribed by the DDA. The same facts also gave rise to a strong inference that the appellant was aware of the drug possessed and the power of disposal over it which provided prima facie proof of actual trafficking. The 7,468 tablets or 801.7g of dangerous drugs in this case is undeniably a large quantity to be carried if not for distribution.

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[17] The last ground canvassed before us pertains to drug in transit. It was submitted that this is not a case of drug trafficking but one of drug in transit as the appellant was on transit to Singapore and the drug was intended to be taken to New Zealand and not for distribution in this country. The case of *Public Prosecutor v Jorge Enrique Pellon Tellon* [1998] 4 MLJ 183 was relied on. In that case the charge of trafficking was reduced to one under s 21(6) of the DDA and the respondent was convicted on his plea of guilty thereto. This court affirmed the conviction and sentence holding that the trial judge was right in finding that having physical possession of the drug in transit was an offence under s 21(6). The cocaine there was found on the respondent's body as a result of detection by the walk through detector at the transit gate of Terminal One of the SAAS Airport just before boarding the plane for Den Pasar in Indonesia. The respondent was on his way from South America and never intended to enter this country, he was only brought out of the airport to the police station for proper search to be conducted.

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[18] Section 2 of the DDA defines the term 'in transit' as follows:

'in transit' means taken or sent from any country and brought in Malaysia by land, air or water (whether or not landed or transhipped in Malaysia) for the sole purpose of being carried to another country either by the same or another conveyance.

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On the undisputed fact of the present case the proscribed drug was not in transit as it came from within the country. Nor was the appellant on transit as he transported the proscribed drug from a hotel in Penang to the Bayan Lepas Airport. The cited case is clearly distinguishable on its fact.

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[19] Be that as it may, whether the proscribed drug was intended for distribution outside the country is totally irrelevant to the offence of trafficking under the DDA. The inclusion of the word 'exporting' as an act of trafficking in the definition of 'trafficking' in s 2 clearly puts distribution abroad within the contemplation of the law. Secondly, the gravamen of the charge is not the act of distributing the drug but the act of transporting the proscribed drug for the purpose of distribution, irrespective of whether the purpose is achieved and irrespective of whether the intended distribution is within the country or abroad. As submitted by the learned deputy the intention of the DDA is to encompass both drugs brought into and out of the country. The reference to the purpose for which the drug is being transported was made by the Privy Council in *Ong Ah Chuan v Public Prosecutor* [1991] 1 MLJ 64 solely to draw a distinction between the offence of mere possession and that of trafficking as the law provides a far heavier punishment for the latter. As stated in the Singapore case of *Lau Chi Sing v Public Prosecutor* [1989] 1 MLJ 5, the offence is completed once there is the act of transportation so long as its purpose is to transfer possession for some other person in contradistinction to an intention

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A to keep the drug solely for one's own consumption. Whether the transporter achieves his purpose is irrelevant to his guilt of the offence of trafficking.

[20] In the upshot and for the aforesaid reasons we found no merit in the appeal. We have also satisfied ourselves that the learned trial judge had given due consideration to the appellant's defence and correctly rejected them for cogent reasons thereby finding no reason to doubt the prosecution case against him. We saw no reason to upset the conviction. We decided accordingly.

C *Appeal dismissed and conviction and sentence affirmed.*

Reported by Ashok Kumar

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